Lifestyle Enterprise (USA) Inc & Anor v LY Furniture Sdn Bhd & Anor and another suit

HIGH COURT (MUAR) — CIVIL SUIT NOS 22–125 OF 2008 AND 23–18 OF 2011
UMI KALTHUM J
29 MARCH 2013

Contract — Agency — Termination — Whether purported termination of agency agreement wrongful — Whether time for payment under agreement not of essence — Sale of Goods Act 1957 s 11 — Contracts Act 1950 s 56(2)

The plaintiffs in Suit No 22–125 of 2008 ('the first suit') were in the business of marketing and distributing wooden and leather-based furniture worldwide under the 'Lifestyle' brand and were part of the 'Lifestyle Group' of companies which included the second defendant ('Lifestyle Holdings') in Suit No 23-18-2011 ('the second suit'). The first defendant in the first suit, LY Furniture Sdn Bhd ('LY'), of which the second defendant was its founder and executive managing director, designed and manufactured furniture including a particular design collection ('the collection') for sale and distribution by the plaintiffs. Under its agency agreement with Lifestyle Holdings, LY could only sell certain models of that collection directly to four named companies in North America but apart from those four companies the sale and distribution of all models in the collection to the North American market could only be made through the first plaintiff in the first suit, Lifestyle Enterprise (USA) Inc. ('the first plaintiff'). Problems developed in the business relationship between the plaintiffs and LY. The plaintiffs discovered that LY had by passed them and sold the collection furniture directly to purchasers in the North American market in breach of the terms of the agency agreement. When the plaintiffs protested, LY responded by purportedly terminating the agency agreement on the alleged ground the first plaintiff owed LY substantial arrears of payment in respect of previous sales. LY also published a notice insinuating that the first plaintiff was in financial difficulties. The plaintiffs in the first suit, inter alia, sought an injunction to restrain LY from continuing to breach the agency agreement and from publishing defamatory statements that reflected adversely on the plaintiffs' trade and business; to require LY to provide an account of sales made and profits earned in breach of the agency agreement and for damages. In the second suit, LY sought, inter alia, a declaration that it had lawfully terminated the agency agreement.

Held:

(1) The plaintiffs had successfully proven on balance of probabilities that LY

had breached the agency agreement. The defendants failed to tender all the documents applied for by the plaintiffs in their application for discovery of documents. Adverse inference was invoked against the defendants under s 114(g) of the Evidence Act 1950 for failure to produce the documents which, if tendered, would probably have proven the plaintiffs' case against them conclusively (see paras 26–27).

(2) The purported termination of the agency agreement by LY was wrongful. On scrutinising the undisputed payment records of the first plaintiff and based on the finding that the parties had agreed to a 21-day payment term, the court found there was no breach in payment terms which meant there were no invoices of LY that were outstanding. Even if there had been a breach (which the court did not find to be so) the agency agreement did not expressly stipulate that payment time was of the essence of the contract. Thus, s 11 of the Sale of Goods Act 1957 and s 56(2) of the Contracts Act 1950 would apply to disentitle LY from terminating the agency agreement (see paras 48–49 & 64(c)).

(3) Since the first plaintiff was not in arrears in making payments to LY right up to the time the latter published the notice about the former's financial difficulties, the words in the notice were untrue and defamatory of the first plaintiff. In their natural meaning and/or by innuendo the words were understood to mean the first plaintiff was in financial difficulties and was a financial risk to LY and to all other parties trading with the first plaintiff. However, as the first plaintiff failed to prove the damages it had suffered, a token sum of RM10,000 was awarded to it as damages. The first plaintiff had also failed to prove that the offending words were drafted personally by the second defendant in the first suit. Hence the defamation claim against him was disallowed (see paras 74–75 & 77).

[Bahasa Malaysia summary

Plaintif-plaintif dalam Guaman No 22–125 Tahun 2008 ('guaman pertama') menjalankan perniagaan pemasaran dan pengagihan perabot berunsur kayu dan kulit di seluruh dunia di bawah jenama 'Lifestyle' dan merupakan sebahagian daripada syarikat 'Lifestyle Group' yang mana termasuk defendan kedua ('Lifestyle Holdings') dalam Guaman No 23–18 of 2011 ('guaman kedua'). Defendan pertama di dalam guaman pertama, LY Furniture Sdn Bhd ('LY'), yang mana defendan kedua merupakan pengasasnya dan pengarah pengurusan eksekutif, telah mereka bentuk dan membuat perabot termasuk koleksi rekaan yang khusus ('koleksi tersebut') untuk dijual dan diagihkan oleh plaintif-plaintif. Di bawah perjanjian agensi bersama Lifestyle Holdings, LY hanya boleh menjual model-model tertentu dalam koleksi tersebut secara terus kepada empat syarikat yang dinamakan di Amerika Utara tetapi selain daripada empat syarikat tersebut jualan dan agihan kesemua model dalam koleksi tersebut kepada pasaran Amerika Utara hanya boleh dilakukan melalui plaintif pertama dalam guaman pertama, Lifestyle Enterprise (USA) Inc ('plaintif

pertama'). Masalah-masalah timbul di dalam hubungan perniagaan di antara plaintif-plainntif dan LY. Plaintif-plaintif mendapati LY telah melepasi mereka dan menjual koleksi perabot tersebut secara terus kepada pembeli-pembeli di pasaran Amerika Utara dalam percanggahan terma-terma perjanjian agensi. Apabila plaintif-plaintif membantah, LY membalas dengan menamatkan perjanjian agensi atas dasar bahawa plaintif pertama berhutang tunggakan bayaran berkenaan dengan jualan-jualan sebelumnya dengan LY. Plaintif-plaintif dalam guaman pertama, antara lain, memohon injunksi untuk menghalang LY daripada terus melanggar perjanjian agensi dan menerbitkan kenyataan fitnah yang mana memburuk-burukan perdagangan dan perniagaan plaintif-plaintif; memerlukan LY untuk mengemukakan akaun jualan yang dibuat dan keuntungan yang diperoleh dalam percanggahan perjanjian agensi dan untuk ganti rugi. Dalam guaman kedua, LY memohon, antara lain, deklarasi bahawa ia telah membatalkan perjanjian agensi secara sah di sisi undang-undang.

Diputuskan:

(1) Plaintif-plaintif telah berjaya membuktikan atas imbangan kebarangkalian bahawa LY telah melanggar perjanjian agensi. Defendan-defendan gagal untuk mengemukakan kesemua dokumen-dokumen yang dipohon oleh plaintif-plaintif di dalam permohonan mereka untuk penzahiran dokumen. Inferens bertentangan telah digunakan terhadap defendan-defendan di bawah s 114(g) Akta Keterangan 1950 untuk kegagalan mengemukakan dokumen-dokumen yang mana, jika dikemukakan, boleh membuktikan kes plaintif-plaintif terhadap mereka secara konklusif (lihat perenggan 26–27).

(2) Pembatalan perjanjian agensi oleh LY adalah salah di sisi undang-undang. Dalam meneliti rekod-rekod pembayaran yang tidak dipertikaikan oleh plaintif pertama dan berdasarkan dapatan bahawa pihak-pihak telah bersetuju kepada terma bayaran 21 hari, mahkamah mendapati tidak terdapat apa-apa percanggahan dalam terma bayaran yang mana bermaksud tidak terdapat invois LY yang tertunggak. Meskipun terdapat percanggahan (yang mana mahkamah tidak mendapati sedemikian) perjanjian agensi tidak secara jelas menyatakan bahawa waktu bayaran adalah intipati kontrak. Justeru, s 11 Akta Jualan Barangan 1957 dan s 56(2) Akta Kontrak 1950 boleh digunapakai untuk membatalkan hak LY daripada menamatkan perjanjian agensi (lihat perenggan 48–49 & 64(c)).

(3) Memandangkan plaintif pertama tidak tertunggak dalam membuat bayaran kepada LY sehingga ke masa LY mengeluarkan notis tentang masalah kewangan plaintif pertama, perkataan di dalam notis adalah tidak benar dan berunsur fitnah tentang plaintif pertama. Dalam maksud semulajadinya dan/atau melalui sindiran perkataan tersebut difahamkan

bermaksud plaintif pertama berada dalam masalah kewangan dan merupakan risiko kewangan kepada LY dan kepada pihak-pihak yang lain yang berdagang dengan plaintif pertama. Walau bagaimanapun, memandangkan plaintif pertama gagal untuk membuktikan ganti rugi yang telah dialami olehnya, sejumlah wang RM10,000 telah diawardkan sebagai ganti rugi. Plaintif pertama juga telah gagal untuk membuktikan bahawa perkataan yang menyinggung tersebut telah didraf secara peribadi oleh defendan kedua dalam guaman pertama. Justeru tuntutan fitnah terhadapnya tidak dibenarkan (lihat perenggan 74–75 & 77).]

Notes

For cases on termination, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2792–2793.

Cases referred to

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Decro-Wall International SA v Practitioners in Marketing Ltd [1971] 1 WLR 361, CA (refd)

Ex parte Island Records Ltd And Others [1978] Ch 122, CA (refd)

Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Others [1998] 1 SLR 374, CA (refd)

Hj Salleh Hj Janan v Financial Information Services Sdn Bhd [2010] MLJU 1990; [2011] 7 CLJ 287, CA (refd)

Mancetter Developments Ltd v Garmanson Ltd [1986] QB 1212, CA (refd)

Payzu Ltd v Saunders [1919] 2 KB 581, CA (refd)

Phang Quee v Virutthasalam & Ors [1965] 2 MLJ 166; [1965] 1 LNS 131, FC (refd)

South Hetton Coal Company v North-Eastern News Association [1894] 1 QB 133, CA (refd)

Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297; [2010] 1 LNS 444, HC (refd)

Legislation referred to

Contracts Act 1950 s 56(2)
Evidence Act 1950 s 114(g)
Sale of Goods Act 1957 s 11

Elaine Yap (Azmimi Pharmy with her) (Wong & Partners) for the plaintiff.
Won Walter Pereira (Izyan Darlina bt Balia Yusof with him) (Kamarudin & Partners) for the defendant.

Umi Kalthum J:

THE CLAIM

Civil Suit No 22–125 of 2008 ('the first suit')

[1] The plaintiffs' claim against the defendants in the first suit in the main is for:

(a) the sum of USD58,087.09 against the first defendant;

(b) a permanent injunction restraining ordering that the the first defendant be restrained, whether by itself, its servants, agents, directors, nominees or otherwise:

(i) from doing or attempting to do various acts pertaining to the manufacture of the collection of wooden furniture designs known as the Louis Phillipe Collection which comprises of various product codes for models of differing dimensions and colours, namely 593, 563, 583, 5933 and 5000 ('the collection'), intended for sale to buyers in North America (save and except to Intercon, Crown Mark, Sunrise and Ampeq) without the consent and/or authority of the first plaintiff; and

(ii) from further publishing words complained of in the first defendant's notice dated 20 August 2008 or words to the same effect and/or other defamatory statements reflecting adversely on the plaintiff's trade and business;

(c) an account of all sales by the first defendant of furniture manufactured with the collection which comprise of models identified as 593, 563, 583, 5933 and 500 and the profits made by the first defendant as a result of such sales;

(d) an order for payment by the first defendant to the plaintiffs of any sum found due upon taking such account; and

(e) general damages.

Civil Suit 23–18 of 2011 ('the second suit')

[2] The first defendant's claim against the plaintiffs in the second suit is for:

(a) a declaration that the agency agreement between the first defendant and

Lifestyle Holdings entered into in or about August 2001 ('the agency agreement') was lawfully terminated on 12 September 2008;

(b) the amended sum of USD52,619.59 from the first plaintiff; and

(c) general damages.

[3] For ease of reference I will maintain the reference to the plaintiffs in the first suit to be the plaintiffs also for the second suit except for the second defendant in the second suit which is referred to as Lifestyle Holdings and similarly the first defendant in the first suit to be the first defendant in the second suit.

THE FACTS

[4] The following are the agreed facts:

(a) the first plaintiff is a company incorporated in the United States of America ('USA'), whilst the second plaintiff is a company incorporated under the laws of Malaysia;

(b) the plaintiffs are trading companies engaged in the marketing and distribution of wooden and leather based furniture to numerous countries in the world under the Lifestyle brand and are part of a group of companies with the headquarters in Singapore ('Lifestyle Group');

(c) the products distributed and sold by the plaintiffs include a collection of wooden furniture designs popularly known as the Louis Phillipe Collection which comprise various product codes for models of differing dimensions and colours, namely 593, 563, 583, 5933 and 500 ('the collection');

(d) the first defendant is a company incorporated under the laws of Malaysia, whilst the second defendant is an individual and is the founder and executive managing director of the first defendant. The second defendant was at all material times the authorised representative of the first defendant in respect of all business dealings between the parties. There was a close friendship between the second defendant and SP1, who is the chairman and chief executive officer ('CEO') of the Lifestyle Group;

(e) the defendants have been in business with the plaintiffs since the late 1990s. By the agency agreement between the first defendant and Lifestyle Holdings Pte Ltd, it was agreed that save for permitted sales of the models 593 and 5933 in the collection to four named companies existing in the furniture trade in North America at the material time, the first defendant would manufacture those models for distribution and sale in the North American market solely through the first plaintiff as an exclusive agent with effect from 17 August 2001;

(f) in 2008, the relationship between the plaintiffs and the first defendant ran into difficulties when, amongst other things:

(i) the first defendant started to increase the price of model 5933 sold to the plaintiffs and reduced the volume of the sales to the plaintiffs. Between February and August 2008, the first defendant had raised prices at least three times;

(ii) as admitted by SD3, it was the first defendant's intention to end the business relationship with the plaintiffs and that it was considered better for the first defendant if the agreement was terminated;

(iii) this period coincided with the sub-prime crisis in the USA which led to the plaintiffs not being able to sustain its usual 48-hour payment terms to its factories and agreements and they sought changes to the payment terms with the first defendant, which met with resistence from the first defendant;

(iv) by a notice dated 20 August 2008 ('the said notice'), the first defendant wrote and published words in regard to the first plaintiff which were understood to mean that the first plaintiff was in financial difficulties. Even though the first defendant had retracted the notice two days later, the published words had already reached the first plaintiff's customers; and

(v) in early September 2008 the plaintiffs discovered that the first defendant had begun manufacturing the collection for sale in the North American market by circumventing the usual channel of delivery through the first plaintiff;

(g) the Lifestyle Group through its head office issued a letter dated 5 September 2008 directly to the first defendant to remind it of its obligations under the agency agreement;

(h) then by a letter dated 12 September 2008, the plaintiffs issued a letter of demand to the first defendant requiring it to, inter alia, immediately cease the manufacture and sale of the collection to any third party in breach of the agency agreement and provide certain undertakings. The first defendant failed, refused and or neglected to comply with the said demand; and

(i) in response to the said letter, the first defendant purported to terminate the agency agreement with immediate effect on 12 September 2008 on the basis of an alleged outstanding payments due to the first defendant.

THE FIRST SUIT

The plaintiffs' case

Unlawful termination of agency agreement.

[5] It is the plaintiffs' case that the purported termination of the agency agreement by the first defendant was without justification and therefore unlawful and thereby had caused the plaintiffs to suffer loss and damage.

Defamation

[6] By the said notice (Tab 14, C), the first defendant had written and published these words which were alleged to be defamatory of the first plaintiff:

> We will like to inform you that at the moment we are facing payment problem with our consignee Lifestyle Enterprise Inc. Due to this circumstances, please hold all the container that are in-transit and arriving at destination. ('the said words').

That by innuendo and/or in their natural and ordinary meaning, the said words meant and were understood to mean that the management of the first plaintiff was in financial difficulties and represented a financial risk to the first defendant and all other parties dealing with the first plaintiff in the trade. As the first defendant was aware at all material times that the payment terms between the parties had been mutually varied with effect from 22 July 2008 from 48 hours to 18 days, and as no payments were outstanding as at 20 August 2008 when the said notice was issued, the said words and/or innuendo are therefore false and unjustifiable in substance and in fact. In consequence thereof the plaintiffs' reputation has been seriously injured and the plaintiffs have suffered considerable embarrassment in the trade.

[7] The plaintiffs are also holding the second defendant jointly and severally liable to the plaintiffs as joint tortfeasors for the loss and damage by them since the second defendant had at all material times authorised, directed and procured and facilitated the unlawful actions of the first defendant.

Unlawful interference with trade

[8] The plaintiffs pleaded that based on the defendants' said actions, it amounted to unlawful interference with the plaintiffs' trade and business, as a result of which the plaintiffs' have suffered loss and damage including loss of market share and goodwill. The defendants are joint tortfeasors in this regard

and are jointly and severally liable to the plaintiffs.

Failure to deliver orders

[9] The plaintiffs alleged that they had paid in full a total sum of USD12,339.60 on or around 3 September 2008 to the first defendant for delivery of a shipment of furniture models 5933, 593 YC and 500 for Sears, Canada under purchase order P1#200877047. As the first defendant had failed to make delivery of the orders and despite demands being made by the plaintiffs for the said sum to be returned, the first defendant failed to comply with the demand thus causing the plaintiffs to suffer loss and damage.

[10] There was further an arrangement between the parties in respect of purchase orders placed by the second plaintiff under a warehousing program whereby the first defendant had been paid an advance of 30% of the value of the orders with the remaining 70% being payable to the first defendant within seven days prior to shipment. By email dated 15 October 2008, the first defendant purported to give the second plaintiff an ultimatum to take delivery of the furniture by 24 October 2007 and to make full payment of the balance purchase price for the orders by 17 October 2008. The second plaintiff alleged that the intended deliveries had been delayed by the first defendant resulting in the cancellation of customer orders for the same. In the circumstances the second plaintiff had, by letter dated 15 October 2008 from its solicitors, given notice to the first defendant to retract its ultimatum and undertake to deliver the furniture upon instructions by the second plaintiff failing which the orders would be deemed cancelled by reason of the first defendant's repudiation and a refund of the advance deposit in the sum of USD45,932.58 becoming immediately due. As the first defendant refused, neglected and/or otherwise failed to comply with the second plaintiff's demand, the second plaintiff had suffered loss and damage.

The first defendant's case

[11] The first defendant contended that:

(a) the first plaintiff sold the collection as the agent of the first defendant being the principal, where it was the first defendant which had designed and manufactured the furniture forming the collection;

(b) around August 2001 there was a meeting between the first defendant and the plaintiffs and the plaintiffs' subsidiaries whereby the plaintiffs were to be the agents of the first defendant in respect of two specific models, that is, models 593 and 5933 of the collection; and

(c) the first defendant entered into the agency agreement on or about August 2001 with Lifestyle Holdings Pte Ltd ('Lifestyle Holdings') whereby

Lifestyle Holdings through its company, the first plaintiff, was chosen to be the sole agent for North America in respect of models 593 and 5933 of the collection subject of the conditions, amongst others:

(i) the first defendant had the right to sell the same models to four other customers in North America, that is, Intercon, Crown Mark, Sunrise and Ampeq; and

(ii) the first defendant was to either issue the letter of credit or make payment for the furniture sold within 48 hours after the delivery of the relevant documents.

[12] The first defendant contended that it had lawfully terminated the agency agreement vide letter dated 12 September 2008 by reason of the plaintiffs' failure to pay to the first defendant arrears in payments to the amount of USD331,547.56. That the first defendant had filed the second suit against the plaintiffs to claim for the arrears in payment. As the termination of the agency agreement was lawfully done, the first defendant was not bound by the agency agreement and was free to sell the models 593 and 5933 to other parties.

[13] It was also the first defendant's contention that it had never agreed to any variation of the terms of payment as alleged by the plaintiffs as evidenced by an email dated 9 April 2008 from the first plaintiff to the first defendant.

[14] As for the alleged defamation suit, the first defendant admitted that it had sent the said notice dated 20 August 2008 to only its forwarders, even though the said notice was addressed to all parties. But it had done so to limit its losses due to the plaintiffs' failure to honour the payments due.

The second defendant's case

[15] The second defendant essentially joined issues with the first defendant. Other than that, the second defendant denied being equally liable with the first defendant for actions alleged to be taken by the first defendant.

THE SECOND SUIT

[16] The statement of claim of the defendants in the second suit essentially pleaded their defence to the plaintiffs' claim in the first suit and claimed for monies overdue from the first plaintiff for the amended sum of USD52,619.59 and interest.

[17] The plaintiffs denied owing the defendants any monies as they had, amongst others:

(a) made payments for Invoices Nos 3758-G, 3759-G, 3760-G, 3761-G,

3756-G, 6999-9, 7000-9, 3771-G, 7013-9, 3775-G, 3772-G, 3773-G and 3774-G to the first defendant on or around 6–7 October 2008;

(b) the first defendant is not entitled to Payment No DN(08)9-0810 as the first plaintiff has to date not received the relevant debit note for the transaction in order for it to process the relevant payment; and

(c) charge backs — that the charge back amounts claimed by the first defendant in the table to para 10 of the statement of claim were lawfully deducted from payments made against the first defendant's invoices as the first defendant had not at any material time objected to the same despite due notice was given.

THE ISSUES

[18] I am guided by the issues identified by the plaintiffs' counsel as follows:

(a) whether the first defendant had breached the agency agreement by manufacturing and selling the collection directly to buyers in North America;

(b) whether the credit terms for payment between the first plaintiff and Lifestyle Holdings and the first defendant was 48 hours which was subsequently changed to 24 hours or 30 days?

(c) whether through the ordinary course of dealings between the first plaintiff and Lifestyle Holdings and the first defendant it was agreed that the first defendant was entitled to deduct any charge back amount from payments made against the first defendant's invoices;

(d) whether the purported termination of the agency agreement on 12 September 2008 was wrongful;

(e) whether the said notice issued by the first defendant to all parties was defamatory of the first plaintiff;

(f) whether the second defendant was personally liable as the directing mind and will of the first defendant;

(g) whether the first defendant's actions as pleaded amounted to unlawful interference with the first plaintiffs' trade and business;

(h) whether the second defendant was personally liable as the directing mind and will of the first defendant;

(i) whether the first defendant had breached its obligations pursuant to the plaintiffs Purchase Order No P1#200877047, for which the plaintiffs' had paid a total sum of USD12,154.51 on 3 September 2008;

(j) whether the plaintiffs were entitled to cancel the orders made under the warehousing program and obtained a refund of the advance deposit in the sum of USD45,932.58 from the first defendant;

(k) whether Lifestyle Holdings was liable to make payments of the sum of USD52,619.59 to the first defendant; and

(l) whether the first defendant was entitled to claim for interest at the rate of 12%pa on any outstanding amount.

Whether the first defendant had breached the agency agreement by manufacturing and selling the collection directly to buyers in north america

[19] As was earlier stated, by the agency agreement, save for permitted sales of the collection to four named companies in North America, that is, Intercon, Crown Mark, Sunrise and Ampeq, the first defendant was to manufacture the collection for distribution and sale in North America market solely through the first plaintiff as its exclusive agent with effect from 17 August 2001 (Tab 2, 3, C). It was also agreed that the first defendant would not accept any new order from any other customer. Although the first defendant's letter dated 21 August 2001 (Tab 5, C) made specific reference to models 593 and 5933, subsequent models 563, 583 and 500 were developed by the Lifestyle Group as variations that form part of the collection. This was so stated by SP1 (Q&A 9(d), P1(A)). This understanding was agreed to by SD2 during cross-examination (pp 75–76, notes of evidence). As such I would agree with the submission of the plaintiff that the first defendant is now estopped from denying that models 583, 563 and 500 form part of the agency agreement.

[20] SP2, who was the manager of the Lifestyle Group at the material time, had testified that he had discovered the breach of the agency agreement by the first defendant during an investigation conducted by him. SP2 stated that he saw Lifestyle Group cartons with the Lifestyle logo covered up with tape and cartons without logos all containing 5933 and 593 models (Q&A 6, P2). On 4 September 2008, SP2 stated that he went to the first defendant's factory and took photographs. The next day he went to the same factory to take more photographs (Tab 60, C) and saw the first defendant's quality control ('QC') staff by the name of Ah Ching to enquire who the goods were being shipped to. According to SP2, Ah Ching showed him the first defendant's weekly master production schedule which showed that the first defendant was manufacturing models of the collection for parties other than the plaintiffs, eg models 593 and 5933 were being manufactured for shipment to 'CS', 'STE' and 'LL' where 'CS' stood for Corporate Specialists (a North American buyer), 'STE' stood for St Lancia, and 'LL' stood for Lifestyle Living. All these buyers are North American buyers. Even though Corporate Specialists has an office in Muar and is a local

company, but according to SP2 Corporate Specialists ship out the products to the American market and that was why he regarded Corporate Specialists as an North American buyer (p 30, notes of evidence). SD1, who is the shareholder and director of CS had confirmed this fact when he stated during cross-examination (pp 54–55, notes of evidence):

> Q: Boleh sahkan Corporate Specialist adalah pembeli perabot dari Malaysia untuk diexport ke Amerika Syarikat?
>
> A: Ya, sahkan
>
> Q: Boleh sahkan sama ada Amerika Syarikat adalah pasaran utama untuk Corporate Specialist?
>
> A: Ya, sahkan.
>
> …
>
> Q: Katakan perabot model Louis Phillipe yang dikeluarkan oleh LY Furniture untuk Corporate Specialist adalah untuk dieksportkan oleh Corporate Specialist ke pasaran Amerika Utara?
>
> A: Ya.

[21] SP3 in turn had confirmed the fact that CS exports furniture to North America buyers (p 32, notes of evidence), wherein, based on a printout from Panjiva.com website, it showed that CS is listed as a company that exports furniture to 122 US buyers including Titan Import and Export Company (which is a member of Home Elegance which in turn is a furniture wholesaler in North America).

[22] SP1 had sent a letter dated 17 September 2008 (pp 2–3, E) to SD3 of the first defendant expressing his disappointment by the said breach. SD3 did not deny the breach vis undated letter on pp 4–5, E.

[23] Learned counsel for the plaintiffs submitted that this court ought to invoke the adverse inference against the defendants under s 114(g) of the Evidence Act 1950 ('Evidence Act') for non production of purchase orders, invoices, shipping documents for the sale of the collection to North America from 2007–2008 and the weekly master production schedule of the first defendant from August 2008 until October 2008. This was because the explanation given by witnesses for the defendants in regard to the master production schedule dated 28 August 2008 was unconvincing in view of the photographic evidence adduced by the plaintiffs. Moreover it was submitted that it was acknowledged by SD2 that there would have been a course of business with the named buyers for the first defendant to start manufacturing based on projected requirements of the buyers, and that contrary to what SD3 had said about model 5933E, SD1 when shown Tab 60, C, had confirmed that

5933E was part of the collection (pp 54–55, notes of evidence). That therefore the position taken by the defendants that the destination orders by CS, LL and Ste Lancia as shown in the master production schedule dated 28 August 2008 were not known, that the collection was only sold to CS after the first defendant had terminated the agency agreement on 12 September 2009, and that the model 5933E was not part of the collection but a different model with the same colour code, cannot be true.

[24] In view of all these factors, it was submitted by the plaintiffs that on a balance of probabilities of motivation, opportunity and clear intention on the part of the first defendant to circumvent the first plaintiff in the sale of the collection to North American buyers, and thus breaching the agency agreement.

[25] For the defendants, it was submitted that the plaintiffs' allegation that the first defendant sold the collection to other buyers in North America was completely without basis. This was because:

(a) models 563, 583 and 500 were never agreed in writing to be included in the collection;

(b) such an important variation to the agency agreement should be in writing;

(c) the first defendant did not sell models 593 and 5933 to other buyers being true to the agency agreement;

(d) with regard to SP2's evidence that he discovered during an inspection of the first defendant's factory that the weekly master production schedule stated that the first defendant sold models of the collection to CS and STE which are codes for the North American buyers Corporate Specialists and St Lucia, that evidence was false as SD1, SD2 and SD3 testified that CS is a local company, while STE is Lanchine Chine Gova in France. The first defendant's invoice at p 46, H, supported this fact which showed that the goods were sent to Le Havre, France and not North America; and

(e) as for the plaintiffs' heavy reliance on the weekly master production schedule (Tab 60, p 214, C) to show that CS had sold the collection to buyers in North America, the defendants contended that that schedule had disproved the plaintiffs' contention since the schedule showed that CS had sold models 0718, 0808A, 0812, 0717 and 5933E which models did not fall under the agency agreement. That SD3 had explained that model 5933E was a completely different model but the colour code for that model is the same as model 5933 (p 122, notes of evidence).

[26] In the premises, it was submitted for the defendants that the plaintiffs had failed to prove that the first defendant had breached the agency agreement.

[27] After scrutinising the relevant documents and the evidence adduced by both parties, I find that the plaintiffs had successfully proven on the balance of probabilities that the first defendant had breached the agency agreement. I do so for the following reasons:

(a) I generally agree with the submission of learned counsel for the plaintiffs on this issue;

(b) I also accept the testimonies of the plaintiffs' witnesses SP1, SP2 and SP3 as being truthful;

(c) based on the testimonies of SP2, SP3 and more importantly SD1, who is the shareholder and director of CS, and whose evidence I had quoted earlier in para 20 above, eventhough CS is a Malaysian incorporated company, CS's main market is in the United States. SD1 had been admitted that CS had exported and is still exporting the collection furniture to North America. I quote SD1's evidence (at p 55, notes of evidence) as follows:

> Q: Sejak bilakah LY Furniture mengeluarkan model Louis Phillippe untuk Corporate Specialist bagi tujuan untuk dieksportkan ke Amerika Utara?
>
> A: Saya sudah lupa.
>
> Q: Adakah boleh memberi anggaran?
>
> A: Lebih kurang tahun 2008.
>
> Q: Adakah Corporate Specialist masih membeli perabot Louis Phillippe dari LY Furniture?
>
> A: Ya, masih membeli.
>
> Q: Boleh sahkan perabot itu masih dibeli dari LY Furniture untuk dieksportkan ke Amerika Utara?
>
> A: Sahkan.

The testimonies of SP2, SP3 and SD1 were corroborated by documentary evidence referred to before this;

(d) of particular importance is the master production schedule dated 28 August 2008 of the first defendant (Tab 60, C) which clearly showed that the first defendant had sold model 5933E to CS which in turn would invariably sell the same to buyers in North America. In this context I reject the testimony of SD3 when he explained without more that model 5933E was a completely different model but the colour code for that model was the same as model 5933 and hence the differentiation letter 'E'

was added. SD3's testimony contradicted that of his own witness SD1. I choose to believe the testimony of SD1 as being more credible compared to that of SD3 whose testimony is suspect seeing that he had direct interest to protect in the suits. The nature of the furniture market being what it is, it would be difficult for me to accept the fact that the defendants were not aware of the main market for the furniture bought by CS to be exported. In any case the defendants did not submit that the defendants were not so aware of CS. market for the collection furniture; and

(e) I therefore hold that model 5933E was merely an attempt by the first defendant to make it look that it had upheld the agency agreement by not selling model 5933 to North American markets when in actual fact it had done so through CS. The addition of the letter 'E' to model 5933 was merely a ruse to support the defendants' contention I note that the sale of model 5933E to CS was dated 17 September 2008, 18 September 2009, 19 September 2008, 20 September 2008, 22 September 2008 based on Tab 6, C, that is, after the purported date of termination of the agency agreement (that is 12 September 2008). But this does not detract from the fact that the defendants had failed to tender all the documents applied for by the plaintiffs in its application for discovery of documents. I therefore invoke the adverse inference against the defendants under s 114(g) of the Evidence Act 1950 for failure to do so. From the testimony of SD1 and SP2, I hold that if these documents had been tendered to court, it would probably prove the plaintiffs' case against the defendants conclusively.

Whether the credit terms for payment between the first plaintiff and lifestyle holdings and the first defendant was 48 hours which was subsequently changed to 24 hours or 30 days

Whether through the ordinary course of dealings between the first plaintiff and lifestyle holdings and the first defendant it was agreed that the first defendant was entitled to deduct any charge back amount from payments made against the first defendant's invoices

Whether the purported termination of the agency agreement on 12 september 2008 was wrongful

[28] The agency agreement came about through an exchange of letters dated 14 August 2001 (Tab 2, C), 17 August 2001 (Tab 4, C), 24 August 2001 (Tab

6, C) between the parties, in particular letter dated 17 August 2001 whereby the parties had agreed to the following terms:

(a) LY confirmed to assign the Lifestyle as sole agent in North America market for 593 Louis Phillipe / 5933 (5 pes set). LY will only sell to 4 customers (Intercon, Crown Mark, Sunrise, and Ampeq) and the selling price must be 10% or more than the price sell to Lifestyle;

(b) LY will not accept any new order from any other customer from North America with effective from today only for 593 Louis Phillipe / 5933 (5 pes set);

(c) LY agreed to reduce 5% from 1 September 2001 and 10% from 1 October 2001 (593 5 pes set) for existing and future order to help Lifestyle to maintain market competitiveness. As for other 5933, LY agreed to deduct 3% from 1 September. Whereas for other items, LY will reduce 5% from 1 Sept). At the same time Lifestyle will commit no less than 100 x 40' containers (593 Louise Phillipe / 5933 collection) per month and LY will honour all order from Lifestyle and ship accordingly. If Lifestyle does not meet the above target, Lifestyle has to reimburse 5% to LY.

(d) With Effective from 1 October 2001, Lifestyle will either issue LC or make payment within 48 hours (after received AWB for complete document sent out to USA) with 1% cash discount. From October 2001, LY will accept L/C at sight as payment term or 1 % cash discount. From now till 1 October, Lifestyle will pay according to the invoicing payment term.

Privity of contract

[29] Before I can proceed to consider the issues, I need to address the issue raised by learned counsel for the defendants in his submission at p 4, para 5 where he stated that the contracting parties to the agency agreement was the first defendant and Lifestyle Holdings Pte Ltd (that is, the second defendant in the second suit) being a Singapore company. That Lifestyle Holdings is not a party to the first suit. As such the plaintiffs' claim for the unlawful termination of the agency agreement in the first suit must fail ab initio for want of privity of contract. I dismiss the defendants' submission on this issue as being perverse seeing that:

(a) the defence of privity of contract was never raised by the defendants in their statement of defence and since it is trite law that parties are bound by their pleadings, the defendants are precluded from raising this issue now;

(b) in fact the defendants in their statement of defence went on the basis that Lifestyle Holdings Pte Ltd and its Group of Companies had entered into

the agency agreement with the first defendant and that the agency agreement bound them all. Below are the salient paras 6–10 of the first defendant's statement of defence (see bundle A):

5. Perenggan 7 Pernyataan Tuntutan dinafikan dan Plaintif-Plaintif diletakkan kepada bukti yang kukuh berkenaannya. Defendan Pertama menafikan kewujudan satu perkongsian perniagaan yang tidak rasmi dengan Plaintif-Plaintif dan juga selanjutnya menafikan pengetahuan bahawa Plaintif-Plaintif telah mengalihkan pesanan-pesanan di Asia kepada Defendan Pertama. Defendan Pertama menyatakan bahawa, sekiranya Plaintif-Plaintif telah mengalihkan semua pesanannya kepada Defendan Pertama, pengalihan tersebut adalah lebih menguntungkan Plaintif-Plaintif.

6. Perenggan 8 Pernyataan Tuntutan dinafikan. Defendan Pertama mengatakan bahawa Plaintif-Plaintif dan syarikat-syarikatnya, telah pada atau sekitar bulan Ogos 2001 berjumpa dengan Defendan Pertama dengan suatu tujuan untuk menjadi agen tunggal Defendan Pertama bagi 2 modal spesifik Collection, iaitu model-model 593 dan 5933.

7. Seterusnya, Defendan Pertama telah memasuki suatu perjanjian agensi (perjanjian tersebut) pada atau lebih kurang Ogos 2001 dengan Lifestyle Holdings Pte Ltd. Di mana, Lifestyle Holdings Pte Ltd. melalui syarikatnya, Plaintif Pertama telah dipilih untuk menjadi agen tunggal di Amerika Utara bagi model-model 593 dan 5933 Collection. Terma-terma penting yang terkandung di dalam surat bertarikh 17.08.2001 (surat tersebut) dan adalah, inter alia, seperti berikut:-

(a) Plaintif Pertama telah dipilih untuk menjadi agen tunggal bagi Defendan Pertama di Amerika Utara bagi Koleksi model-model 593 dan 5933 sahaja;

(b) Walaupun perlantikan Plaintif Pertama sebagai agen tunggal, Defendan Pertama mempunyai kebebasan untuk memberikan model-model tersebut kepada 4 pelanggan lain di Amerika Utara, iaitu Intercon, Crown Mark, Sunrise dan Ampeq;

(c) Plaintif Pertama samada akan mengeluarkan Surat Kredit atau membuat bayaran bagi perabot yang dijual dan menghantarkan dalam tempoh 48 jam selepas menerima hantaran dokumen-dokumen berkenaan.

8. Defendan Pertama mengatakan bahawa surat tersebut adalah Perjanjian Agensi tunggal yang sah dan Perjanjian tersebut menghadkan agensi Plaintif-Plaintif kepada model-model 593 dan 5933 dan itupun agensi tunggal adalah terhad.

9. Perenggan 9 Pernyataan Tuntutan dinafikan dan Defendan Pertama mengatakan bahawa Plaintif-Plaintif tidak, samada secara nyata atau tersirat, dilantik untuk menjadi agen-agen tunggal di Amerika Utara bagi model-model 563, 583 dan 500 Koleksi tersebut.

10. Perenggan 10 Pernyataan Tuntutan dinafikan dan Defendan Pertama mengatakan bahawa ekslusiviti adalah terhad kepada model 593 dan 5933 dan itu pun, ekslusiviti tersebut adalah terhad.

(c) the whole trial was conducted on the premise that the agency agreement had also involved and bound the plaintiffs in the first suit and the first defendant and the defendants had never raised the issue of privity of contract until in learned counsel's submission;

(d) in any case, other than raising this issue in para 5 of his submission learned counsel for the defendants was contented to devote the rest of his submission as if the terms or purported terms of the agency agreement were in issue between the parties; and

(e) I therefore rule that the reference to 'Lifestyle' in the agency agreement would include the companies in the Lifestyle Group as intended by the parties and therefore include the plaintiffs in the first suit.

Payment terms

[30] Switching to the three issues at hand, it was the plaintiffs' contention that the credit terms for each contract manufacturing order placed by the Lifestyle Group with the first defendant were increased from 48 hours to 21 days and ultimately to 30 days, and not reduced to 24 hours as contended by the first defendant. In support of the plaintiffs' contention reference was made to:

(a) the email dated 24 March 2008 (Tadb 11, C) from the Lifestyle Group to the first defendant whereby Lifestyle confirmed that the payment terms would be varied to 21 days, that is, 18 days after receipt of complete shipping documents (parties seem to refer the payment period to be 21 days or 18 days interchangeably and I therefore like wise do so in this judgment to refer to the same). This confirmation came about after discussion between SP1 and SD3 with no objection on the part of the first defendant other than to request to defer implementation (p 111, notes of evidence);

(b) a meeting which was held between the representatives of the parties on or around 22 April 2008 at which SD3 requested for a three month period of adjustment for the variation to take effect pending the first defendant obtaining credit line from its bankers. This request was agreed to by SP1 for the plaintiffs. Thus the payment terms were varied to 18 days, that is, 21 days with effect from 22 July 2008 (Q&A 5, P3(A); p 111, notes of evidence; p 74, H); and

(c) a subsequent notice to all vendors including the first defendant, that the Lifestyle Group further varied the payment terms to 30 days with effect from 1 September 2008 which was necessary due to the US sub prime crisis as personally explained by SP1 for the plaintiffs to SD3 for the first defendant (Q&A 5, P3(A); Q&A 11, P3(C); pp 20 N–20 O, 20 P-20R, D; pp 112–113, notes of evidence).

[31] The plaintiff further contended that evidence showed that payment terms between the parties were discussed between SP1 and SD3, and that as with any problems encountered by the parties, it would have been discussed between SP1 and SD3, and any agreement reached between the two would be conveyed to their respective subordinates to carry out. This fact was confirmed by SD3, who confirmed that matters relating to the business dealings and problems between the parties would be referred to him at the first defendant (p 109, notes of evidence). It was submitted by the plaintiff that this was the way business was conducted between the parties.

[32] Moreover, SD2 had also conceded that there was email exchanged between the parties regarding the change to 21-day payment term and that there was no evidence to show that the first defendant did not agree to it as seen in her testimony as follows:

G, muka surat 16 dirujuk

Q: Setujukah sistem PDC telah pun menukar terma bayaran kepada 21 hari sebelum email di muka surat 16, G ditulis?

A: Setuju.

Q: Setujukah email di muka surat 16, G tiada apa-apa perkataan yang menunjukkan LY tak setuju dengan pertukaran terma bayaran kepada 21 hari?

A: Tak setuju kerana tidak ada perbincangan [Soalan diulangi.]

A: Setuju.

[33] SD3 had admitted that there was a discussion between SD3 and SP1 to delay the implementation of the 21-day payment terms and that SP1 had given more time to the first defendant to manage its cash flow before implementing the 21-day payment terms. SD3 had also admitted that the first defendant had requested the 24-hour payment terms pending the implementation of the 21-day payment terms (pp 111, 114, notes of evidence). From the testimonies of SP1, SP3, SD2 and SD3, the 24-hour payment terms was subject to special condition for payment and only applied to assist the first defendant with interim cash flow problems.

[34] In view of the US sub-prime crisis fully manifesting itself in 2008 with numerous chapter 11 bankruptcies being filed in the USA and the difficulties encountered by the first plaintiff in this regard at the material time, it was submitted that it was more probable on the balance that the credit terms for payment between Lifestyle USA and Lifestyle Holding and the first defendant had been increased from the previous 48-hour term rather than reduced to 24 hours.

[35] It was the defendants' position that the original payment term was as specified in the agency agreement, that is, 48 hours, which was in practice for almost seven years until the first plaintiff issued an email dated 24 March 2008 (Tab 11, C). It was also the defendant's position that they had never agreed to the changed payment terms of 21 days and that the 48-hour payment terms was reinstated on 9 April 2008 by an exchange of emails (p 72, H) when the first plaintiff replied 'We already did' (email (1), p 72H).

[36] When the first plaintiff again tried to impose the 21-day (18-day) payment terms via email (1) dated 21 April 2008, p 74, H, the first defendant had insisted on the 48-hour terms (email (2), of same date, p 74, H). Even though the defendants did not dispute about the meeting held on 22 April 2008, however perusing the terms varied and agreed upon and reduced to writing in the memorandum dated 22 April 2008 ('memorandum') on p 17, G, there were no terms of payment which had been reduced to writing in the memorandum. In fact the notation by the first defendant on the said memorandum was that there was no amendment on payment terms. It was therefore contended that the 21-day (18-day) payment terms was not effected.

[37] Instead it was the defendants' contention that on 9 July 2008, by way of email (pp 77–78, H, email (2)), the first defendant had stated that there was now a new agreement after discussion by the parties to vary the payment terms from 48 hours to 24 hours as follows:

> I wish to bring to your attention that yesterday Mr William Hsieh and Mr Tan Kwee Chai have a very cordial and fruitful discussion pertaining to Lifestyle and LY business relationship. They have mutually agreed during the discussion the payment term which effects from today (9 July 2008) base on the clause below.
>
> *Lifestyle agreed to remit the payment to LY within 24 hours upon receiving LY's email/fax of the following documents:*
>
> (1) *Packing List.*
>
> (2) *Incoice.*
>
> (3) *Draft BL.*
>
> I wish to follow up on a written copy of this agreement agreed upon yesterday from Lifestyle.
>
> We would appreciate if you can let us have the said letter by today in order for us to do the necessary arrangement.
>
> We sincerely appreciate this arrangement will ease our cashflow constraint. Your prompt attention and reply is appreciated.

[38] This new arrangement was confirmed by the first defendant vide email dated 11 July 2008 (p 79, H). That being the case, there was no dispute that from 11 July 2008 the term of payment was 24 hours.

[39] There was yet another attempt made by the plaintiffs to vary the payment terms to 30 days with effect from 1 September 2008 vide notice in Tab 16, C. According to the defendants, that was unilateral notice and that the defendants had not agreed to the change in the payment terms as stated in email dated 1 March 2008 (p 113, H, email (1)) and that therefore all transactions continued on a 24-hour payment term basis.

[40] After scrutinising all relevant documents and the submissions of learned counsel, I am inclined to accept the plaintiffs' contention that the payment terms from 48 hours had been agreed by the parties to be changed to 21 days (that is, 18 days). I do so for the following reasons:

(a) I generally accept the submissions of learned counsel for the plaintiffs as stating the truth of the matters disputed;

(b) I accept the submission that both the plaintiffs and the defendants dealt with each other vide the discussions held between SP1 and SD3, and after agreement was reached the respective party would inform their respective subordinates of it and to implement the agreement reached. This 'practice' by the parties was testified to by both SP1 and SD3 and as alluded to earlier, being the major players for the plaintiffs and the defendants respectively;

(c) I find that the defendants had agreed to the 21-day payment terms and that on the request of the first defendant, SP1/the plaintiffs had agreed to defer its implementation to enable the first defendant to obtain bank credit. This can be seen from the answers given by SD3 for the defendants during cross-examination as follows (p 111, notes of evidence):

> Muka surat 74, H dirujuk.
>
> Q: Email (2) dirujuk, setujukah melalui email ini, apa yang Encik Yap Chung Wu minta dari Lifestyle Enterprise Inc adalah masa untuk mendapatkan kredit dari Bank sebelum terma bayaran 21 hari diimplementasikan?
>
> A: Setuju
>
> Q: Rujuk email (1), setujukah kamu ada pergi berbincang dengan Encik Hsieh untuk menangguhkan implementasi terma bayaran 21 hari seperti dicadangkan dalam email ini?
>
> A: Setuju
>
> Q: Setujukah dalam perbincangan antara kamu dan Encik Hsieh, Encik Hsieh telah bersetuju untuk menangguhkan implementasi tempoh bayaran 21 hari selama 3 bulan lagi?
>
> A: Tak setuju
>
> Q: Katakan Encik Hsieh ada memberi lebih banyak masa kepada LY

Furniture untuk menguruskan cash flow sebelum mengimplementasi terma bayaran 21 hari seperti yang diminta oleh kamu sendiri?

A: Setuju.

Q: Setujukah perbincangan mengenai lebih masa implementasi masa 21 hari adalah diadakan pada 22.4.2008 di Singapura?

A: Kami ada bincang tapi bukan mengenai pembayaran. Sekarang saya kata setuju.

(d) in this context, the very fact that the defendants' counsel had referred to the 48-hour payment terms was reinstated on 9 April 2008 served to show that there was a change in the terms of payment from 48-hour to 21 days in the first place. However, reference to email (1) on p 72, H by learned counsel for the defendants to show that the plaintiffs had agreed to the reinstatement of the 48-hour payments terms I find to be fallacious seeing that email (1) which stated 'We already did', was in reply to the email (2), of the same page from the first defendant requesting assistance to inform the person-in charge:

> Can you please assist us to inform the related person-in charged to update the PDC for those PO stated of 21 days as payment term, revised to '48 hours upon shipment with 1.5% discount'?

That -mail (2) cannot be said to have reinstated the 48-hour payment terms;

(e) the reference to email (2), dated 21 April 2008 on p 74, H, by the defendants to show that the first defendant had not agreed to the 21-day payment terms, missed the point made by the plaintiffs which was that, upon the request by the defendants to defer the implementation of the 21-day payment terms because the first defendant was facing cash flow problem and was unable to get any new credit line, the plaintiffs had agreed to its deferment. This would explain the email (2) being worded as:

> Further to our previous discussion on changing the payment terms, until now we still unable to get any new credit line from our bankers. In this case we have to remain current practice of 48 hours T/T so that we have sufficient cash flow to meet our obligations
>
> Your understanding and assistance is much appreciated.

and the reply from the first plaintiff in email (1) p 74, H, as:

> Start from May 1, it will be normal payment term (18 days after received complete faxed shipping document). If you have any problem, I will suggest Mr Tan [SD3] to discuss with Mr Hsieh [SP1];

(f) I do not give credence to the notation made by someone for the first defendant on the said memorandum to the effect that no amendment on payment terms seeing that that notation could have been made at any time after the agreement was reached and more so in support of the defendants' case. In any case, SD2 could not even verify the person who made the notation (pp 84–85, notes of evidence);

(g) as for the defendants' contention that the payment terms had in fact changed from 48 hours to 24 hours vis email (2), page 77-78, H, I accept the plaintiffs' contention as being true, that is, that the 24-hour payment terms were agreed to by the plaintiffs subject to special conditions for payment and only applied to assist the first defendant with interim cash flow problems. I agree that the plaintiffs' contention as being the more probable one than that of the defendants' seeing that at the material time the US was facing the sub prime financial crisis which had also affected the plaintiffs adversely, and therefore the credit terms for payment between Lifestyle USA and Lifestyle Holdings and the first defendant would most probably need to be increased from the previous 48-hour term rather than further reduced to 24 hours; and

(h) I also find that there was no further agreement to change the payment terms from 21 days to 30 days. In this context, I agree with the defendants' submission that the plaintiffs had unilaterally changed the payment terms to 30 days (obviously because of the sub prime crisis) vide the notice (paras 20N–20O, 20P–20R, D Tab 16, C) and therefore it was not effective against the defendants. The language of the notice itself showed this was so:

> So we have no choice but change our payment term (to all Asian vendors) to '30 days' term, see effective from September 01, 2008. It will be all '30 days' payment after receiving your shipping documents.

Alleged outstanding invoices

[41] The first defendant had prepared a summary of alleged indebtedness of the first plaintiff at p 145, H. The first defendant did so by relying on the 24-hour payment terms to allege delay in payment by the plaintiffs and Lifestyle Holdings. It was contended by the plaintiffs that if the credit term had been changed to 21 days, none of the alleged outstanding invoice would have been outstanding as at 12 September 2008 when the first defendant terminated the agency agreement.

[42] It was also submitted by the plaintiffs that despite the change to the 21-day credit term, the plaintiffs and Lifestyle Holdings continued to make the 48-hour payment terms during the requested period of adjustment by the first defendant. It was also submitted that even if we were to take the first

defendant's position of 24-hour payment terms, there would have been no breach of the agency agreement justifying termination of it at the material time on account of delayed payment given that:

(a) payments were remitted by the first plaintiff and there is a 12-hour time difference between Malaysia and the USA; and

(b) SP3's explanation that the amounts were not overdue eg the email was sent out on 21 July 2008, which was a Monday in Malaysia and if SP3 were to count backwards, the overdue three days would mean payment was due on a Sunday. As the 48-hour payment terms apply to 48-hour business days, it was in fact not overdue.

[43] Instead, the defendants took the position that the time difference between the USA and Malaysia, weekends and holidays were not to be taken into consideration when computing the 24-hour time payment.

[44] It was also contended by the plaintiffs that payment records of the first plaintiff from 23 July 2008–31 August 2008 clearly showed that payments were always made well within 18 days (that is 21-day payment terms) and in many cases within 48 hours. Even if there was a breach of the payment term due to one day delay, it was submitted that such a breach did not entitle the first defendant to terminate the agency agreement.

[45] Reference was made to s 11 of the Sale of Goods Act 1957 ('SGA') where it provides that:

> Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

It was submitted that given the nature of business dealings between the parties, the constant change in credit terms and the absence of an express term in the agency agreement providing that time shall be of the essence, the time for payment for orders made in respect of the collection was not of the essence. In view of this, s 56(2) of the Contracts Act 1950 ('Contracts Act') applies as follows:

> (2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the special time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

Reference was made to two English cases of *Payzu Ltd v Saunders* [1919] 2 KB 581 (CA) and *Decro-Wall International SA v Practitioners in Marketing Ltd*

[1971] 1 WLR 361 (CA) to illustrate s 11 of the Sale of Goods Act 1957 ('SGA') and s 56(2) of the Contracts Act 1950.

[46] It was therefore submitted that in this case, not only was there no breach, there was no breach tantamount to repudiation of the agency agreement.

[47] The defendants on the other hand took the position that contemporaneous documents showed that the first defendant had sought payments and that payments were overdue (p 75, H, email (2); p 80, H, email (1), (2)).

[48] Having scrutinised the payment records of the first plaintiff in Tabs 42 and 43 in bundle C, which were not disputed, and based on my finding that the parties had agreed to a 21-day payment terms, I agree with tue submission of learned counsel for the plaintiffs that there was no breach in the payment terms for the period from 23 July 2008–31 August 2008. That too when I had not taken into account the time difference between Malaysia and the USA, and the public holidays. There were many instances when payments were made by the first plaintiff earlier than the document submission dates (I counted 40 in all in both Tabs 42–43). There were also many instances where, if the time frame to be taken was 24 hours, the delay, if any, was only one day. I therefore find there was no breach in payment terms which meant that there were no outstanding invoices which had yet to be paid. In fact, after the plaintiffs had closed their case, the first defendant abandoned its claims for USD102,215.10 of the allegedly unpaid invoice, which had been paid by the first plaintiff by October 2008 as well as for liquidated unpaid late payment interest calculated at 12%pa on the said sum (see p 67, notes of evidence).

[49] I also agree with the submission of learned counsel for the plaintiffs that even if there had been a breach (which I have found to be not so), there was no express stipulation in the agency agreement that payment time is of the essence of the contract. That being the case the provisions of s 11 of the Sale of Goods Act 1957 ('SGA') and s 56(2) of the Contracts Act 1950 would apply to this case and the first defendant was not entitled to terminate the agency agreement.

The charge backs

[50] The first defendant claimed that the first plaintiff owed it the sum of USD110,210.18 (and not 'RM' as submitted by the defendants' counsel) for charge backs deducted by the first plaintiff for the months of February to July 2008 on furniture sold (pp 19–20, B). Subsequently the first defendant's claim

was reduced to the amended sum of USD52,619.59 after setting-off payments received for orders which transactions were not completed.

[51] It was the first plaintiff's and Lifestyle Holdings' stand that all charge back deductions were made in the normal course of business and which were not previously disputed. In any event the charge back deductions were fully supported by the relevant documentation.

[52] SP3 explained how the Lifestyle Groups generally allow its customers to claim charge backs within 1 1/2 years for any defects found in the furniture sold as follows (Q&A 2, P3B):

(a) the customer intending to claim for charge backs would inform the sales person in the Lifestyle US office;

(b) the credit people at the US Lifestyle office would then process all the charge backs, review claims sent by sales and would enter the charge back claims into the PDC system;

(c) from the PDC system they would generate a report and email to Lifestyle Malaysia; and

(d) this process would be done at the end of every month on the account cut-off date, at which point SP3 would email the first defendant to inform them of the charge back to be deducted the following month.

[53] SD2 had confirmed that charge back deductions were made in the normal course of business between the parties where there were defects in the furniture delivered to the customers (p 67, notes of evidence). That upon receipt of the charge back report from the Lifestyle Group, the first defendant would make the necessary deductions for charge back if the first defendant did not object to it within the stated time frame (p 68, notes of evidence). SD2 had admitted that the charge backs the first defendant was now claiming for were all informed to the first defendant before they were made and that the first defendant should have raised any objections to the deductions after receiving the relevant payment advice (see p 70, notes of evidence):

C, muka surat 91, Tab 39 dirujuk

…

Q: Setujukah inilah potongan-potongan yang dibuat?

A: Setuju.

Q: Setujukah potongan-potongan ini telah dimaklumkan kepada LY sebelum ianya dibuat?

A: Setuju.

Q: Sekiranya ada apa-apa bantahan terhadap charge-back ini maka LY Furniture mestilah ada buat bantahan selepas menerima payment advice? A

A: Setuju.

[54] As for the charge back claims by the first defendant in the table to para 10 of the statement of claim (pp 23–24, B), SP3 had addressed each and every one of the said claims. SP3 had explained that they were lawfully deducted from payments made against the first defendant invoices as shown by the relevant payment advice. Learned counsel for the plaintiffs had tabulated all the charge backs claimed by the first defendant vis the payment records of Lifestyle in the various bundles C and D in para 72 of her submission and the reasons for the charge backs were explained and tabulated in para 73 of her submission vide the testimony of SP3. Suffice for me to make reference to these paragraphs of her submission without having to reproduce them in this judgment. B C D

[55] It was the plaintiff's case that, vide SP3's testimony, the first defendant was at all material time aware of the charge backs given, that they were notified of the same via email (Tab 9, 10, 13, C) and the plaintiffs did not receive any protests from the first defendant regarding the charge backs. SP3's testimony was corroborated by SD2 when she said she had received the charge back reports at pp 4–9 of bundle D, which stated the particulars of the defects and had also received all the payment advice and charge back reports in the bundle of documents. Further, the return advice or memorandum of charges or service list with photographs relating to the charge back was normally entered into the first plaintiff's PDC Systems to which the first defendant had access and had been given a vendor password to enable the first defendant to retrieve all the charge back data which had been emailed to them. E F

[56] It was contended by the plaintiffs that where there was no dispute in regard to the charge back deductions made in the normal course of dealing between the parties, but which is now raised by the first defendant, it was to justify the first defendant's termination of the agency agreement and as an afterthought. G H

[57] For the defendants, it was contended that the payment advice was a monthly summary of payments made by the first plaintiff to the first defendant. That the first plaintiff had failed to provide justification for the deductions which were arbitrary. The first plaintiff had only provided evidence in the month of August 2008 for charge backs given for the month of July 2008. No other charge back reports were given for the material period of January to July 2008. SD2 had given evidence that there were calls made between the parties on these deductions objecting to the charge backs. As these I

calls were to no avail, the first defendant had placed on record its objection by way of an email dated 3 September 2008 (p 113, H) stating:

> … Recently we also received high charge back sum totaling USD 85,266.13 since 1 July 2008 out if total sum of USD109,790.18 since January this year. We would like to know the cause of the charge back before we agree to this sum deducted from the payment.

to which there was no reply. As the plaintiffs had failed to justify their deductions for the charge backs the first defendant was entitled to the return of the charge backs plus interest at 12%. Learned counsel for the defendants was unable to explain how the 12% interest was imposed on the return of the charge backs amount other than to say that 'the first defendant is not a money lending company but a business entity and may only charge interest upon default of payment and not otherwise. However, should any debtor wish to pay its debt, the interest accrued from default as stipulated is chargeable and collectible'. That in the circumstances, the first defendant was entitled to claim the 12% interest on the refundable sum of USD52,619.59.

[58] I accept the submission of learned counsel for the plaintiffs as being the more probable scenario pertaining to the deductions if the charge backs by the first plaintiff. I accept the testimony of SP3 as being truthful whilst that of SD2 as being defensive of the first defendant's position. SD2 was not able to explain the non protestation by the first defendant of the charge back deductions for a long while until nine days before the purported termination of the agency agreement by the first defendant on the 12 September 2008 whilst the email objecting to the deductions was sent on 3 September 2008 (p 113, H). The first defendant was very well aware of the business arrangement as explained by SP3 with regard to the charge back deductions where it was required to raise any objection with the first plaintiff before the first plaintiff would made the deductions. This the first defendant had failed to do other than to show the email dated 3 September 2008 raising matters well before that date.

[59] From the testimony of SP3, it can be seen that the sums deducted were not arbitrary as reasons were given as to why such sums were deducted eg with regard to charge back no 700009854, for the sum of USD657.12 deducted on 27 February 2008 (p 91, C, item no 28) the reason given was 'Rails will not attach; split; broken in carton; cracked / bowed' (p 23, D); charge back no 700010447, for the sum of USD380.42 deducted on 27 February 2008 (p 91, C, item no 29) the reason given was 'Broken; middle support will not let rails connect; broken in carton; found weak open joint / split' (p 23, D).

[60] I find it hard to believe that the first defendant was not aware of the charge back deductions made by the first plaintiff seeing that the payment advice given to the first defendant by the first plaintiff would have indicated the

deductions made and the resulting lesser amounts being paid by the first plaintiff to the first defendant. I therefore dismiss the defendant's contention as being a lame one. The first defendant had all opportunities to raise any objection to the deductions and had chosen, save for that email dated 3 September 2008, not to do so. I find the defendants' learned counsel's submission on the oral objections raised by SD2 as being unconvincing seeing that there was no plausible reason for her not to reduce the objections to writing. This is more so since there seemed to be no limit to the emails being sent to and from between the parties on many matters. The deductions of the charge backs I consider as a very important matter as it would mean the first defendant would suffer losses as a result of it, and for the first defendant to not raise any objection in writing about it is something that is difficult for me to accept.

[61] As for the arbitrariness of the deductions by the first plaintiff, as I have stated before this, the first defendant had the opportunity to dispute the amount and had failed to do so within the stipulated time period. That being the case, the first defendant must be regarded as having accepted those figures / sums stated by the first defendant and cannot now dispute it. Also, I note the concerns raised by the first plaintiff in its email dated 18 April 2007 to the first defendant on the issue of high charge backs as a result of the 'quality' issues of the furniture imported from the first defendant as follows (Tab 9, C):

> Lisa, it seems LY is having high charge back for the past few months. We would appreciate should your management could look into the quality issued and take appropriate preventive action plan to minimize the charge back. This will definitely help both of us; to save your orders and saving our customer. We shall deduct the charge back from your next available payment should we do not received any feedback from you by 23rd April 2007.

This email to me did not show any sense of arbitrariness on the part of the first plaintiff to deduct the charge backs. It had instead showed the first plaintiff's concerns that its and the first defendant's business could be affected by it if the deductions continue to be high.

[62] Seeing that the first defendant's protests about the charge back was only reduced to writing in the email dated 3 September 2008, I agree with the submission of the plaintiffs' counsel that it was done as an after thought and in view of the first defendant wanting to terminate the agency agreement.

[63] In this regard I rule that the first defendant had failed to prove its claim for charge backs for the sum of USD52,619.59 (prayer 18(b), p 25, B) and I therefore dismiss it. With the same token I dismiss the first defendant's claim to 12% interest on the said same (prayer 18(d), p 25, B).

[64] For the reasons I have alluded to before this, I rule that:

(a) the credit terms for payment between the first plaintiff and Lifestyle Holdings and the first defendant was 48 hours which was subsequently changed to 21 days;

(b) through the ordinary course of dealings between the first plaintiff and Lifestyle Holdings and the first defendant, it was agreed that the first defendant was entitled to deduct any charge back amount from payments made against the first defendant's invoices; and

(c) the purported termination of the agency agreement on 12 September 2008 by the first defendant was wrongful.

THE DEFAMATION

[65] With regard to the said notice dated 20 August 2008, during re-examination of SP1 he explained that he was in USA at the time when his 'USA President' came to see him and showed him the letter and informing him that the 'USA President' had gotten many telephone calls from salesmen and from buyers. SP1 testified that the indication of there being a payment problem was like a virus/desease spreading in the market where everyone was telling everyone that Lifestyle could not pay the bill which created a business rumour that Lifestyle was going out of business.

[66] SP3 had also testified that a third party had approached her with regard to the said notice (p 40, notes of evidence):

> Q: The first plaintiff's case rest on this letter which it claims to be defamatory. Did any party come to first plaintiff to say that they received this letter?
>
> A: Yes, our US office came to me and said first plaintiff received letters distributed out by defendant (1). It was from American Global Logistic which sent letter to first plaintiff to say that they received this letter.

[67] The first defendant's own witness, SD2, had also confirmed that the said notice was sent by the first defendant, albeit only to the Evergreen Line Shipping (pp 65–66, notes of evidence). SD2 had testified that the goods were delivered on FOB basis which meant that once they left the first defendant's furniture factory, the risk would have passed to the end buyer and therefore the first defendant had no interest to stop the shipment. By sending out the said notice, the first defendant must have known that the end customers of Lifestyle USA would question the non-arrival of its goods as arrangements would have been made for receipt of the consignment.

[68] It was further submitted that the words and/or innuendo were false and unjustifiable in substance and in fact. That the first defendant was aware at all material times that the payment terms between the parties had been mutually varied with effect from 22 July 2008 from 48 hours to 21 days (or 18 days) and that in fact, no payments were outstanding as at 20 August 2008 when the said notice was issued.

[69] Reference was made to the English Court Appeal case of *South Hetton Coal Co v North-Eastern News Association* [1894] 1 QB 133 for the principle of law that a corporation can sue for defamation in certain circumstances. Per Kay LJ at p 145:

> … But where the plaintiffs are two or more persons associated in partnership, the only libel of which they can jointly complain is one which may injure their joint property or their joint trade or business. The same law is applicable to a certain extent to a trading corporation. Its property or its business may be injured by defamatory statements whether written or oral. It has a trading character, the defamation of which may ruin it. If, for example, an individual, a private partnership, or a corporation were carrying on a trading business, and some one wrote and published an untrue statement that they were insolvent, or any other statement which might destroy their credit or paralyse their business, it is obvious that such a statement, if untrue, would be a libel.

In the Malaysian Court of Appeal case of *Hj Salleh Hj Janan v Financial Information Services Sdn Bhd* [2010] MLJU 1990; [2011] 7 CLJ 287 the court held that, at p 293 (CLJ):

> … It is clear that it is defamatory to allege someone to be a bankrupt when that person is not. In *Gatley on Libel Slander* ((11th Ed), p 6 para 2.21) it is said:
>
> > … it is defamatory to say that any person (whether or not he is a trader or in business and including a corporation) is insolvent, or cannot or will not pay his debts, …

[70] The first plaintiff also claimed damages against SD3/the second defendant as the controlling mind of the first defendant. It was submitted that the second defendant as the founder and managing director was in control of the first defendant and possessed the necessary authority to decide for the first defendant as agreed to by the defendants in the statement of agreed facts. The manner in which the first defendant conducted its business also suggested that the instructions for the issuance of the said notice came from SD3 seeing that the said notice clearly had serious implications when published in respect of the first plaintiff/Lifestyle Group being a longstanding and substantial customer of the first defendant for many years and where SP1 was in many communications shown to have been a generous benefactor if the first defendant. Reference was made to the Singapore Court of Appeal case of

Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Others [1998] 1 SLR 374 and the English Court of Appeal case of *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212 to support the first plaintiff's contention on this principle of law.

[71] It was the defendant's case that, vide the evidence of SD2, the said notice was a standard notice and was only sent to the shipper, Evergreen Line Shipping, and that no other parties received the said notice nor its retraction letter (pp 130 and 132, G). SD2 gave further evidence that it was her decision to send the said notice as it was within her area of responsibility and that it was done after discussion with her shipping executive (Q&A 44, D2). She denied that SD3 was the one who made the decision to send the said notice (p 66, notes of evidence).

[72] SD2 also gave evidence that she had withheld in-transit containers to other customers in similar circumstances in order to mitigate damages. Her evidence was corroborated by SD1 who testified that he too had withheld containers when there is non-payment and that it was a common practice in the industry.

[73] The defendants further submitted that the said notice contained no connotation of libel nor defamatory in any manner as it was a statement of truth and wholly justified. Moreover, the first plaintiff had failed to adduce a single witness who purported to have received the said notice to testify that the words connote a defamatory meaning. As for damages claimed for loss of business from 12 customers (Q&A 14, P1(B)) as a result of the said notice, it was submitted that on close examination of the cancelled order report (pp 69–77, D) it showed that orders were cancelled well before the said notice was sent on 20 August 2008. For example, at p 74, bundle D, the first plaintiff's customer Best Furniture Inc had cancelled orders on 13 June 2008. The first plaintiff was attempting to claim damages which were untruthful and willfully misleading to this court. In the circumstances, the first plaintiff's claim for defamation was wholly without merit and without basis.

[74] I agree with the submission of learned counsel for the first plaintiff that the words in their natural meaning and/or by innuendo were meant and were understood to mean that the management of the first plaintiff was in financial difficulties and represented a financial risk to the first defendant and all other parties dealing with it in the trade. The said notice was addressed to 'All Parties Concern'. This would mean that it was the intention of the first defendant to have disseminated the said notice not only to Evergreen Line Shipping, which was admitted by SD2, but to any party within the trade. The first defendant had subsequently sent out another notice dated 21 August 2008 (p 131, G), again addressed to 'All Parties Concern', reiterating the said notice. I accept the

testimonies of SP1 and SP3 as being truthful when they stated how the said notice became widely known to not only Evergreen Line Shipping but also to other third parties.

[75] Since I have found that the first plaintiff was not in arrears in making payments to the first defendant right up to the time the said notice was sent I therefore find that the words were not true of the first plaintiff and therefore defamatory of the first plaintiff. This in turn means that, as the defamatory words had been published by the first defendant, the first defendant is liable for defamation of the first plaintiff. I reject the first defendant's submission that, according to SD2, the said notice was in a standard form (and not letter) which would have been issued as a normal business transaction, since the first defendant was unable to adduce documentary evidence to show that that had been the normal business practice of the first defendant when customers delay/did not make timely payments. I also reject the testimony of SD1 that the issuance of the said notice is a common practice in the industry since he was unable to produce documentary evidence to that effect. Secondly, in the light of the special relationship between SP1 for the first plaintiff and SD3 for the first defendant and the long business relationship between the first plaintiff dan the first defendant as adduced through the evidence, the issuance of the said notice would have constituted a very serious matter for the first defendant to have done without first giving it serious consideration by the first defendant/SD3.

[76] I am, however, not prepared to find SD3 liable for defamation personally as the first plaintiff had failed to prove that the offending words were drafted personally by SD3 himself. What was clear to me at the trial of this case was that SD3 had to give his testimony in Mandarin and which was translated into the Malay language. So he could not strictly speaking be the author of the words, as was in the Singapore case of *Gabriel Peter & Partners* where the court found the respondents not only prima facie participants in the passing of the board resolution found to be libellous but also that they went further than simply 'directing or procuring' the commission of the tortious act, that is, that they were the ones who passed and phrased the working of the resolution. Moreover, in the same Singapore case, the Court of Appeal had stated that it was the appellants' choice as to who they wanted to bring the action against, the company or the respondents, and not both. In that case, the appellants chose to sue the respondents/directors and not the company.

[77] I therefore dismiss the first plaintiff's claim under this head against the second defendant and allow it against the first defendant. However, in regard to the damages claimed as a result of the said notice, I agree with the observations made by learned counsel for the defendants in that the cancelled order report adduced through SP1 showed that orders were cancelled well before the said

notice was sent on 20 August 2008. I therefore find that the said report does not prove the damages suffered by the first plaintiff. Since the first plaintiff had failed to prove damages it had suffered, but at the same time I have found the first defendant liable for defamation of the first plaintiff which had resulted in the first plaintiff being queried about its financial standing by many quarters, I am of the view that a token sum of RM10,000 damages as a reasonable amount to be awarded to the first plaintiff.

THE UNLAWFUL INTERFERENCE WITH THE FIRST PLAINTIFF'S TRADE AND BUSINESS

[78] It was submitted for the plaintiffs that the aforesaid actions of the first defendant also amounted to an unlawful interference with the plaintiff's trade and business. The High Court case of *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297; [2010] 1 LNS 444 was cited which in turn referred to the English case of *Ex parte Island Records Ltd And Others* [1978] 1 Ch 122 at p 136 for the principle of law on unlawful interference as follows:

> [98] According to Lord Denning MR in *Ex parte Island Records Ltd And Others* [1978] Ch 122, at p 136:
>
> > A man who is carrying on a lawful trade or calling has a right to be protected from any unlawful interference with it:
> >
> > See *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 1 WLR 1676.

and at p 337(MLJ); pp58–59 (CLJ), the learned judge stated:

> [105] The tort of unlawful interference arises when one person using unlawful means with the object of causing damage to another (*Merkur Island Shipping Corporation v Laughton & Others* [1983] 2 AC 570 (HL)). Thus, in a situation where the defendant commits an actionable wrong, like inducing a breach of contract …, or where the defendant authorises or procures a breach of copyright for purpose of harming the plaintiff … the defendant is said to commit the tort of unlawful interference.

[79] Learned counsel for the plaintiffs other than making this assertion did not go further to submit how the defendants had unlawfully interfered with the first plaintiff's trade and business. The first plaintiff was unable to show the cancelled orders by its customers were due to the unlawful interference of the first defendant of its business dealings. As for the said notice being issued, it was issued on the mistaken belief (which belief had led to the defamation suit) that the first plaintiff was in arrears of its payments to the first defendant for furniture sold. I therefore find that the defendants are not liable for the tort of unlawful interference.

THE ALLEGED FAILURE TO DELIVER ON ORDERS — REFUND OF USD12,154.51

[80] According to the plaintiffs, on or around 3 September 2008, they had paid in full a total sum of USD12,154.51 (after an agreed 15% discount) to the first defendant for delivery of a shipment of furniture models 5933, 593YC and 500 for Sears, Canada under purchase order P1#200877047 as evidenced through the following documents:

(a) the payment record dated 3 September 2008 (item no 3) (Tab 49, C);

(b) the email dated 4 September 2008 from the Lifestyle Group to the first defendant informing the first defendant that the group had made a prepayment for the said purchase order (p 40, Tab 25, C); and

(c) the first defendant's own pleadings in the statement of claim in respect of the second suit where the table showed 'Payment received P1200877047' in the sum of USD12,154.51 (p 22, B).

[81] Despite making full payment of the purchase price, the first defendant failed to make delivery of the orders and/or to provide notification of shipment of the same within a reasonable time. Following the non-delivery of the 'Sears Order', the plaintiffs duly cancelled the said order and demanded a refund of the sum paid to the first defendant, which to date remains unpaid (Tab 26, C). It was therefore submitted that the plaintiffs were entitled to make this claim. Moreover, the fact that the first defendant had set-off this amount from its claim against the first plaintiff was the first defendant's tacit admission of its indebtedness to the first plaintiff (p 67, notes of evidence).

[82] It was not disputed that the first defendant did not deliver the consignment of furniture to the first plaintiff. Neither was it disputed that the first defendant had set-off the sum of USD12,154.51 received from the first plaintiff for the purported outstanding sum owed by the first plaintiff to the first defendant. In the premises, I agree with the submission by learned counsel for the first plaintiff that as the first plaintiff had chosen to terminate the contract for the said sears order, then it was for the first defendant to refund the sum of USD12,154.51 to the first plaintiff. As there were no outstanding payments due to the first defendant from the plaintiffs and Lifestyle Holdings and I as I have found that the charge backs were properly made by the first plaintiff, I therefore find the first defendant cannot set-off the sum of USD12,154.51 against these two heads of claim by it against the plaintiffs/Lifestyle Holdings and I consequently order the first defendant to refund the same to the first plaintiff (see *Phang Quee v Virutthasalam & Ors* [1965] 2 MLJ 166; [1965] 1 LNS 131 (FC)).

A THE REFUND FOR 30% ADVANCE PAYMENT UNDER WAREHOUSING PROGRAM

[83] In July 2008, parties came to a separate agreement whereby the second plaintiff would place purchase orders with the first defendant under a warehousing programme. SP3 had explained that the warehousing program was a separate arrangement the purpose of which was to accomodate situations where a customer would want to purchase many different product groups at one time. In the normal course of business, the second plaintiff would limit the number of product groups that could be ordered in one container. In this way the warehousing programme would allow customers to purchase many different groups of product from various vendor at one time in one container (Q&A 7, P3(B).

[84] As required under the arrangement, the plaintiffs had paid the first defendant an advance of 30% of the value of the orders in the sum of USD45,932.58, with the remaining 70% was payable to the first defendant within seven days prior to shipment whereby shipping instructions would be received from the second plaintiff as agreed in the ordinary course of dealings. (Q&A 15, P3(A)). The particulars of the payments made were adduced through the evidence of SP3 and found at Tab 4 of bundle C and as set out in the plaintiffs' counsel's submission (para 109) and also reference was made to the relevant payment records on pp 19F, 19G, 20B and 20C of bundle D which showed the upfront 30% payment for orders made under the warehousing programme.

[85] However, by an email dated 15 October 2008 (Tab 27, C), the first defendant purportedly gave the second plaintiff and ultimatum to take delivery of the furniture by 24 October 2008 and accordingly to make full payment of the balance purchase price for the order by 17 October 2008. It was contended by the plaintiffs that the first defendant's ultimatum to them was not in accordance with the parties' agreement and course of dealings and not justifiable since the intended deliveries were in fact delayed by the first defendant resulting in the cancellation of customer orders for the same. According to the evidence of SD2, she had corroborated with the evidence given by SP3 when she stated (at p 73, notes of evidence):

> Q: Katakan apabila LY Furniture menghantar perabot menurut Program Warehousing itu terma-terma bayaran menghendaki bayaran pendahuluan sebanyak 30% harga barangan?
>
> A: Setuju.
>
> Q: Setujukah terdapat 35 pesanan untuk Warehousing Program di mana Lifestyle telah pun membuat bayaran pendahuluan tetapi pesanan tidak disempurnakan dan barangan-barangan tidak pernah dihantar?

A: Setuju.

Q: Setujukah jumlah bayaran yang dibuat oleh Lifestyle adalah USD45,932.58 yang dituntut balik oleh Lifestyle?

A: Setuju.

[86] The second plaintiff, through its solicitors' letter dated 15 October 2008, had given notice to the first defendant to retract its ultimatum and undertake to deliver the furniture upon instructions from the second plaintiff, failing which the orders would be deemed cancelled by reason of the first defendant's repudiation and a refund of the advance deposit in the sum of USD45,932.58 becoming immediately due (Q&A 11, P3(A).

[87] The first defendant failed to comply with this demand to date. Instead, the first defendant had set-off the said sum from its claim against the first plaintiff and Lifestyle Holdings, which in itself served to show the first defendant's tacit admission that the said sum was refundable to the first plaintiff for total failure of consideration. The plaintiffs therefore prayed their claim for the refund of USD45,932.58 be allowed.

[88] It was the first defendant's submission that the terms of the warehousing programme were as contained in the email dated 26 August 2008 (p 87,H) where the material terms (at least in regard to payment) were:

(a) 30% up front cash deposit payable within two days from signing the PO, (purchasing order), balance 70% payable before trucking;

(b) the PO to be confirmed by 31 July 2008, otherwise the first defendant may not be able to ship in September2008 due to time constraint; and

(c) all previous understanding or agreement implied or express should cease with immediate effect.

[89] The first defendant admitted to receiving the 30% payment of USD45,932.58 (not RM45,932.58 as stated by the defendant's counsel) but claimed that the 70% was never paid even though the first defendant had put the first plaintiff on strict notice of the consequence of non-payment of the balance of 70% by way of email dated 8–9 October 2008 (p 152, H). The first defendant also had admitted to setting-off the said amount from amounts due and owing from the first plaintiff in the form of the charge backs and claimed that the first plaintiff's claim had thereby been extinguished by the set-off against the charge backs which were wrongfully deducted.

[90] From the facts, what is clear to me is that both parties had agreed in respect of the warehousing programme that the first plaintiff was required to

pay 30% up-front cash deposit for orders made and the balance of 70% was payable subsequently. The up-front payment had been duly made by the first plaintiff as admitted by the first defendant. As for when the balance of 70% payment was to be made the parties seemed to differ. According to the first plaintiff, it was payable within seven days prior to shipment whereby shipping instructions would be received from the second plaintiff as agreed in the ordinary course of dealings. But according to the first defendant, vide its email dated 26 July 2008 (p 87, H), the balance 70% was payable before trucking. It is unclear to me what was the actual understanding of the parties with regard to the balance of 70% payment was to be made. It appears to me that this is a case of parties being at cross-purposes with each other whereby each party had tried to impose on the other the terms they see fit to impose, especially in regard to the finer details of payment. That being the case I am unable to state whose fault it was in regard to the non-fulfillment of the warehouse programme other than to state since the first defendant had not fulfilled its part of the bargain whilst the first plaintiff had paid to the first defendant the 30% up-front payment, there is a failure of consideration on the part of the first defendant which had unilaterally imposed the term of payment of the balance 70% on the first plaintiff to be on a fixed date of 24 October 2008, failing which it had refused to deliver the furniture to the first plaintiff. The first defendant instead had utilised the 30% payment to set-off what it perceived as amounts owing to it from the first plaintiff in the form of the charge backs.

[91] Since I have found that there is a failure of consideration on the part of the first defendant and the first plaintiff wished for the return of the monies having cancelled its orders, I rule that the first defendant must return the 30% deposit in the sum of USD45,932.58 to the first plaintiff (see *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597).

THE FIRST DEFENDANT'S CLAIM FOR USD52,619.59 IN THE SECOND SUIT

Whether the first defendant was entitled to claim interest at 12%pa on outstanding amount

[92] Both these issues have been answered by me under the heading 'Charge Backs' where I ruled that the first defendant cannot claim the sum of USD52,619.59 for the return of charge backs nor the 12% interest per annum

on it.

THE CONCLUSION

[93] For the reasons adumbrated above I make the following orders:

The first suit

(a) prayer (a), for the sum of USD58,087.09 against the first defendant (that is USD12,154.51 + USD45,932.58) is allowed;

(b) prayer b(i)–(ii) is allowed;

(c) prayers (c), (d) and (e) are allowed;

(d) in respect of prayer 6, general damages in the sum of RM10,000 in respect of the claim for defamation by the first defendant against the plaintiffs is allowed; damages for wrongful termination of the agency agreement to be assessed by the learned deputy registrar;

(e) interest, at the rate of 3%pa on the sum of USD58,087.09 from the date of filing of the first suit to the date of judgment, and at 5%pa from the date of judgment to full realisation, is allowed. Interest is also allowed on the sum of RM10,000 at the rate of 5%pa beginning from the date of judgment to full realisation; and the same rate of 5%pa applies to the sums found due upon taking an account of the profits made by the first defendant and assessment of general damages for breach of contract beginning from the date of the order for such payment to full realisation;

(f) costs at RM30,000. and

The second suit

(g) I dismiss the first defendant's claim against the first plaintiff and Lifestyle Holdings with costs at RM30,000.

Order accordingly.

Reported by Ashok Kumar